Supreme Court U.S.
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No. 981376 FEB 01 '99

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1998

BRIAN G. TACKETT,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the District Court have subject matter jurisdiction under 18 U.S.C.§844(i) as applied in this case, where the alleged crime is the arson of a church whose congregation resided totally within one state and where the government only proved a "de minimus" affect on interstate commerce?

2. Does 28 U.S.C. 2255 afford the opportunity for collateral review of an instruction when the instruction given by the trial court violated the United States Constitution's Due Process Clause?

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versus

UNITED STATES OF AMERICA, - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITATIONS OF REPORTS OF THE OPINIONS ENTERED IN CASE

No opinions in the case have been reported in official or unofficial publications.

STATEMENT OF JURISDICTION

The opinion of the United States of Appeals for the Sixth Circuit was entered on the 6th day of November 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

This case involves 18 U.S.C. 844.(i), the Commerce Clause of the United States Constitution, Article I, Section

8, the 5th Amendment of the United States Constitution and 28 U.S.C 2255.

STATEMENT OF THE CASE

SUMMARY:

The Petitioner was convicted of arson, conspiracy, carrying a firearm in relation to a violent crime and interstate transportation of a stolen vehicle, in relation to the burning of the Barren River Baptist Church in Kentucky in the early morning hours of 6 December, 1991. His conviction was appealed and affirmed. See *United States* v. *Pierce et al*, 62 F. 3d 818 (CA 6, 1995). The Petitioner filed a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. Section 2255, based in part on this Court's ruling in *Lopez* v. *United States*, 514 U.S. 549 (1995). This motion and a Certificate of Appealability were denied on 9 April, 1998. A Petition for a Certificate of Appealability was filed with the United States Court of Appeals for the Sixth Circuit and was denied 6 November, 1998. The Petitioner asserts the Barren River Baptist Church was not engaged in interstate commerce within the standard set forth in *Lopez* v. *United States*, *supra*, and therefore, the Federal Court lacked jurisdiction over the alleged offense of burning the church, or conspiracy to burn the church.

STATEMENT:

The evidence established all members who attended Barren River Baptist Church resided in Kentucky. Moreover, the evidence established the ministry programs conducted by the church were for the benefit of Kentucky residents. The only possible activity involving interstate commerce was the purchase of some church supplies from out of state suppliers. The Petitioner argued that the Government had not proven an active involvement in interstate commerce. The Court ruled against the Petitioner under the apparently settled law that the government must

only prove a "de minimis" affect on interstate commerce and accordingly instructed the jury with the same standard that the jury did not need to find any particular degree of affect on interstate commerce.

ARGUMENT

1. Does the District Court have subject matter jurisdiction under 18 U.S.C 684(i), as applied in this case, where the alleged crime is the arson of a church whose congregation resided totally within one state and where the government only proved a "de minimus" effect on interstate commerce?

Lopez v. *United States, supra,* changed the settled law regarding criminal statutes requiring a nexus to commerce. Since *Lopez,* courts must require a more substantial jurisdictional nexus. *United States* v. *Valenzeno,* 123 F3d 365 (CA 6, 1997). This petition raises an "as applied" jurisdictional challenge to 18 U.S.C. §844(i) involving the burning of the Barren River Baptist Church and not a "facial" challenge to the statute. However, see *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S 490, 505 (1979), wherein it was stated, "nonprofit institutions in general . . . . did not affect commerce"). *Lopez* set out three things congress Commerce Clause Power may reach: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those interstate activities having a substantial connection to interstate commerce. *Lopez, supra,* at 556-61. This Court also clarified that the proper "rational basis test" requires an analysis of whether the regulated activity substantially affects interstate commerce. *Id.,* at 559-61.

As the evidence proved a "de minimis" nexus with interstate commerce the Petitioner was denied a dismissal of the charges and found guilty by the jury upon an unconstitutional instruction, because the Court believed a substantial affect upon interstate commerce was not required under the jurisdictional element of 18 U.S.C. §844(i).

2. Does 28 U.S.C. 2255 afford the opportunity for collateral review of instruction when the instruction given by the trial court violated the United States Constitution's Due Process Clause?

The Trial Court in denying the Petitioner's 28 U.S.C. §2255 motion ruled jury instructions are not subject to attack in a 28 U.S.C. §2255 motion. The Petitioner asserts that an instruction violating the Constitution's Due Process Clause is cognizable under §2255. See *Estelle* v. *McQuire*, 502 U.S. 62, 72 (1991) and *Donnelly* v. *Dechristoforo*, 416 U.S. 637, 643 (1974). In this case, the court's instruction lowered the government's burden of proof on an essential jurisdictional element of the offense. As set forth in *Lopez*, *supra*, the jury and court was required to find a substantial effect on commerce to convict. However, it is true that to challenge an unconstitutional instruction on collateral review the Petitioner must show "cause and prejudice". The cause for Petitioner's failure to object to the instruction at trial, or raise the error on appeal, was the state of the law at that time. Until *Lopez* was decided, the objection would have been held without merit. The prejudice is the continued enforcement of a conviction based upon an incorrect interpretation of the Commerce Clause by the trial court.

The Petitioner did not receive a fair trial and prays this Writ of Certiorari be granted so this wrong can be corrected.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. 1:97CV-76-H
(In re: CR 1:92CR-15-02-H)

BRIAN G. TACKETT, - - - *Petitioner/Defendant,*

v.

UNITED STATES OF AMERICA, - *Respondent/Plaintiff.*

MEMORANDUM OPINION—
Entered April 9, 1998

This matter is before the Court on the Motion to Vacate, Set Aside or Correct Sentence (DN 394) filed by the petitioner/defendant pursuant to 28 U.S.C. Section 2255. The United States has responded (DN 396), and the petitioner/defendant has replied (DN 397). The motion, other pleadings and relevant portions of the record have been considered by the Court.

In the early morning hours of December 6, 1991, members of the Ku Klux Klan ("Klan") burned the Barren River Baptist Church ("Church") to the ground. *United. States v. Pierce,* 62 F.3d 818, 822 (6th Cir. 1995). Following a long and contentious trial, the jury convicted Brian G. Tackett ("Tackett") of arson, conspiracy, carrying a firearm in relation to a violent crime and interstate transportation of a stolen motor vehicle. *Id.* Tackett was sentenced to 152 months' imprisonment and three years supervised release (DN 365).

"Tackett appealed his conviction. He claimed (1) the trial court erred in denying his motion for a mistrial and

severance; (2) the trial court erred in denying his motion for new trial in light of alleged government intimidation of witnesses, government presentation of allegedly perjured testimony and the post-trial confession of Chris Conner; (3) the trial court erred in denying his motion for new trial based on the jury verdict being against the great weight of the evidence; (4) his trial counsel rendered ineffective assistance; (5) the trial court improperly questioned witnesses; and (5) the trial was fundamentally unfair. Pierce, 62 F.3d at 823-835. The United States Court of Appeals, Sixth Circuit, affirmed the conviction in a published opinion. *Id.*

In his motion to vacate and memorandum in support, Tackett raises seven grounds for relief (DN 394). Tackett complains that (1) 18 U.S.C. Section 841(1) did not confer subject matter jurisdiction upon the trial court; (2) the trial court gave constitutionally infirm jury instructions; (3) the government intimidated defense witnesses; (4) the government used perjured testimony and deliberately suppressed evidence favorable to the defense; (5) the government made improper remarks during closing argument; (6) the trial court erred when it denied him the right to hybrid representation; and (7) defense counsel was ineffective during sentencing (DN 394).

I. SUBJECT MATTER JURISDICTION

Tackett claims that his conviction should be vacated because 18 U.S. C §841(i) did not confer subject matter jurisdiction upon the trial court. Tackett contends that since the Barren River Baptist Church is not a "building . . . used in any activity affecting interstate or foreign commerce" the burning is not a chargeable offense under § 841(i).

The undersigned finds that Congress intended 18 U.S.C. § 844(i) to encompass acts of arson such as the malicious burning of the Barren River Baptist Church. *United States v. Charleen,* 67 F.3d 1208, 1213-1215 (6th Cir. 1995), denied, 116 S.C. 795 (1996). The plain language of the statute prohibits the malicious destruction, by means of fire, of

any "building . . . used . . . in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). The church was clearly a "building," and the evidence adduced at trial was more than sufficient to establish that it was used in an activity affecting interstate commerce. Thus, the plain language of the statute encompassed Tackett's act of arson.

Contrary to Tackett's assertion, unlike the unconstitutional statute in *United States v. Lopez,* 514 U.S. 549 (1995), "18 U.S.C. § 844(i) does contain a jurisdictional element, which ensures, through proper inquiry, that the arson in question affects interstate commerce." *Charleen,* 67 F.3d at 1213-1215. "The statute specifically requires that the burned building must have been 'used in interstate . . . commerce' or 'used . . . in an activity affecting interstate . . . commerce.' " 18 U.S.C. § 844(i). *Charleen,* 67 F.3d at 1214-1215. Thus, *Lopez* is distinguishable from the present case, and the undersigned finds that Congress did not exceed its authority under the Commerce Clause when it enacted 18 U.S.C. § 844(i). *Charleen,* 67 F.3d at 1214-1215. In sum, the district court's jurisdiction over this matter was proper.

II. INSTRUCTIONS TO THE JURY

Next, "Tackett takes issue with the trial court's instructions to the jury (DN 394). A § 2255 motion is not intended to serve as a substitute for direct criminal appeal. *United States v. Fray,* 456 U.S. 152, 165-169 (1982). Furthermore, jury instructions are not subject to attack under § 2255. *Holbrook v. United States,* 441 F.2 371 (6th Cir. 1971).

III. GOVERNMENT INTIMIDATION OF WITNESSES, SUPPRESSION OF EVIDENCE AND USE OF PERJURED TESTIMONY

Next, Tackett contends that the government intimidated defense witnesses, it deliberately suppressed favorable evidence and it knowingly used perjured testimony (DN 394). These claims were raised post trial in motions for acquittal (DN245) and for new trial (DN244). The trial court con-

ducted lengthy hearings and found that the claims lacked merit (DN 315, pp. 20-28). Then prior to sentencing, Tackett again moved the trial court for a new trial (DN 320). The trial court again denied the motion (DN 348). Then, just days before sentencing, through newly appointed counsel, Tackett again asked for a new trial on the grounds that his trial counsel had rendered ineffective assistance because of a failure to object to and request a mistrial due to the government's intimidation of defense witnesses (DN 359). The trial court denied the motion (DN 364). Tackett then raised the issues on direct appeal. *Pierce*, 62 F.3d at 831-834. The Sixth Circuit affirmed the trial court's rulings. *Id.*

Generally, a § 2255 motion may not be used to relitigate issues raised and considered on direct appeal. *United States v. Prichard*, 875 F.2d 789, 790-791 (10th Cir. 1989) (per curiam). Therefore, "Tackett may not relitigate issues that he raised and were considered on direct appeal. *Id.* True, "Tackett has alleged additional instances in which the government allegedly intimidated defense witnesses and allegedly used perjured testimony. However, these are bare assertions that are wholly unbelievable. Further, before Tackett may obtain collateral review of issues that should have been raised on direct appeal, he must first show cause to excuse his failure to do so and actual prejudice resulting from the alleged violations. 456 U.S. at 167-169. Tackett offers neither (DN 394) and in his reply (DN 397) concedes that he can not satisfy the standard. Therefore, review of this claim is barred.

IV. IMPROPER REMARKS DURING CLOSING

Next, Tackett contends that the government made improper remarks during closing argument (DN 394). Tackett alleges that the claim was raised on direct appeal but was not considered by the Sixth Circuit (DN 394) pp. 121-122; citing Appellant Brief pp. 12-13).

The clam was not raised on direct appeal to the Sixth Circuit because the briets[1] did not identify the claim in the "statement of issues presented for review" and because the briefs did not set forth any argument concerning the claim.[2] Pages 12 and 13 of the brief filed by appellate counsel do refer to remarks made by the prosecutor. However, the reference was part of the argument in support of Tackett's claim that the trial court erred in denying his motions for mistrial and for a severance from co-defendant Pierce. Pages 12 and 13 in the pro se brief make no mention of remarks by the prosecutor.[3] Before Tackett may obtain collateral review of a claim that should have been raised on direct appeal, he must first show cause to excuse his failure to do so and actual prejudice resulting from the alleged violations. *Fray,* 456 U.S. at 167-169. Tackett offers neither and in his reply (DN 397) concedes that he can not satisfy the standard. Therefore, review of this claim is barred.

V. RIGHT TO HYBRID REPRESENTATION

Next, Tackett alleges that the trial court erred when it denied him the right to elect hybrid representation (DN 394). Tackett raised this issue in his motion for new trial (DN 244). The trial court found that the claim lacked

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[1]Two appelant briets were filed. One by appellate counsel on November 30,1994 and one by Tackett on January 5, 1995.

[2]Rule 28(a)(3) of the Federal Rules of Appellate Procedure requires a "statement of the issues presented for review." Rule 28(a)(6) directs that for each issue presented the argument "must contain the contentions of the appellant . . . and the reasons therefore, with citations to the authorities, statutes, and parts of the record relied on."

[3]If Tackett believed that the Sixth Circuit failed to consider his claim he should have advised the court that it had overlooked the claim. *See,* Rule 40(a), Federal Rules of Appellate Procedure. However, his petition for rehearing and suggestion for rehearing *en banc* did not.

merit (DN 315). Tackett failed to raise the issue on direct appeal. A § 2255 motion is not intended to serve as a substitute for direct criminal appeal. *United States v. Fray*, 456 U.S. 152, 165-169 (1982). Before Tackett may obtain collateral review of this issue which should have been raised on direct appeal, he must first show cause to excuse his failure to do so and actual prejudice resulting from the alleged violations. *Fray*, 456 U.S. at 167-169. Tackett offers neither and in his reply (DN 397) concedes that he can not satisfy the standard. Therefore, review of this claim is barred.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Tackett contends that he received ineffective assistance of counsel during sentencing because his attorney failed to object when the trial court imposed a $200,505 restitution judgment (DN 394). Tackett argues that counsel should have brought the relevant factors set forth in 18 U.S.C. § 3663 to the attention of the trial court. Tackett believes that if the trial court had considered those factors it would have concluded that Tackett is unable to pay the judgment.

In order to establish constitutionally ineffective assistance of counsel, Tackett must show (1) that counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense to a degree so serious as to deprive Tackett of a fair trial and a reliable result. *Strickland v. Washington*, 466 U.S. 668,687 (1984). In *Strickland*, the Supreme Court adopted a two-prong test for determining whether a defendant received adequate assistance of counsel. *Id.* at 687. The first prong is competence. *Id.* at 687-688. Tackett must show that representation fell below an objective standard of reasonableness. *Id.* at 688. The performance inquiry must be whether counsel's assistance was "reasonable considering all the circumstances." *Id.* The prevailing norms of practice reflected in publications such as the *American Bar Association Standards* are only guides to determine what

is reasonable performance. *Id.* The Supreme Court noted as follows:

> "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions . . .
>
> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."

Id. at 688-689. Therefore, the reviewing court must make every effort to eliminate the distorting effects of hindsight in order to reconstruct "the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. A strong presumption exists that counsel's conduct was within the wide range of reasonable, professional assistance because of the difficulties inherent in making the evaluation. *Id.* at 689. As a result, Tackett "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (citation omitted). Since there are countless ways to provide effective assistance to a defendant in a criminal case, the reviewing court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance." *Id.*

Under the second prong of the *Strickland* test, Tackett "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.; see also Hutchins v. Garrison,* 724 F.2d 1425 (4th Cir. 1983) (burden on petitioner to

show prejudice), *cert. denied*, 464 U.S. 1065 (1984).

The trial court was not required to make explicit findings about the statutory factors before ordering restitution, *United States v. Blanchard*, 9 F.3d 22, 25 (6th Cir. 1993). Secondly, 18 U.S.C. § 3664(a) requires only that the probation officer include in the pre-sentence report "information sufficient for the court to exercise its discretion in fashioning a restitution order." 18 U.S.C. § 3664(a). Factors that the probation officer should include are (1) an accounting of the losses of the victims; (2) any restitution owed pursuant to a plea agreement; (3) and the economic circumstances of the defendant. 18 U.S.C. § 3664(a). The statute does not mandate the trial court to make a specific finding as to the above factors.

The pre-sentence report provided the trial court with all of the information required by the statute (DN 366). The amount of restitution was determined to include $200,000 owed to the members of the Barren River Baptist Church and $500 owed to West Side Motors, owner of the stolen car (DN 366, p. 16). The report indicated that Tackett had no financial assets, no bank account and owned no real or personal property (DN 366, p. 13). The report also indicated that although 18 U.S.C. § 3663 did not require the court to order restitution, the sentencing guidelines did mandate restitution (DN 366). The trial court after consideration of the pre-sentence report had an appropriate basis for ordering Tackett to make restitution in the full amount of $200,505. In light of all the circumstances, the alleged failure to object was not outside the wide range of professional competent assistance. *Strickland*, 466 U.S. at 689. Furthermore, Tackett cannot show that there is a reasonable probability that, but for the alleged error, the trial court would not have ordered restitution in the amount of $200,505.

/s/ John G. Heyburn II
John G. Heyburn II
United States Magistrate Judge

Copies: Counsel of Record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. 1:97CV-76-H
(In re: CR 1:92CR-15-02-H)

BRIAN G. TACKETT, - - - *Petitioner/Defendant,*

v.

UNITED STATES OF AMERICA, - *Respondent/Plaintiff.*

ORDER—Entered April 9, 1998

Petitioner/Defendant has moved to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255 (DN 394). The Couit having reviewed this motion, having set forth its findings in a Memorandum Opinion, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Petitioner/Defendant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. §2255 is DENIED.

A Certificate of Appealability is DENIED.

This 8th day of April, 1998.

/s/ John G. Heyburn II
John G. Heyburn II
United States Magistrate Judge

Copies: Counsel of Record

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIAN G. TACKETT, - - - *Petitioner/Appellant,*

v.

UNITED STATES OF AMERICA, - *Respondent/Appellee.*

ORDER—Filed November 6, 1998

Before: MARTIN, Chief Judge.

Brian G. Tackett appeals a district court order denying his motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. Tackett now moves for a certificate of appealability under Fed. R. App. P.22(b). Upon review, the court denies Tackett's motion.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk